STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of MAX UNGER and TYLER UNGER, Minors.

FAMILY INDEPENDENCE AGENCY and OAKLAND COUNTY PROSECUTOR'S OFFICE,

Petitioners-Appellees,

v

MARK UNGER,

Respondent-Appellant,

WE MAC,

Nonparty-Appellant.

UNPUBLISHED
May 16, 2006

No. 264134
Oakland Circuit Court
Family Division
LC No. 2003-686416-NA

Before: Fort Hood, P.J., and Sawyer and Meter, JJ.

PER CURIAM.

This appeal involves a supplemental petition[1] filed by the Oakland County Prosecutor's Office and the Family Independence Agency (now the Department of Human Services), as copetitioners, which requested that the trial court assume jurisdiction over respondent's minor children under MCL 712A.2(b)(1) and (2), and terminate respondent's parental rights under MCL 712A.19b(3)(g) and (j). As relevant to this appeal, the supplemental petition contains allegations that respondent has a history of substance abuse, which included approximately six months of treatment at an inpatient facility.[2] The trial court granted petitioners' pretrial request

[1] Although the petition is labeled a supplemental petition, it appears, in substance, to be an amended petition filed after this case was transferred from the Benzie Circuit Court to the Oakland Circuit Court. The correct characterization of the petition is not material to this appeal.

[2] In a prior appeal, this Court held that the trial court erred in determining that a finding of criminality relating to the death of the children's mother and respondent's wife, in the absence of a criminal charge or conviction, violated respondent's due process rights, and by thereby
(continued…)

for disclosure of records from the inpatient facility.[3] Appellants, respondent and the record holder treatment facility, appeal by leave granted from the trial court's disclosure order. We affirm in part, modify in part, and remand for further proceedings.

This appeal arises from the dispute regarding the disclosure of respondent's treatment records from WeMAC. The prosecutor's office, as copetitioner, sought the treatment records by court order. Respondent, who asserted that the federal requirements were not satisfied to release the records to the trial court, adamantly opposed the disclosure of the records. In response, the prosecutor offered to omit any reference to the treatment period, but would merely note that respondent had not been present in the children's lives for a five-month period. However, respondent's counsel insisted that the completion of the WeMAC program could be referenced, without more, and did not permit review of the records by copetitioner. Respondent's counsel insisted this reference was permitted because the prosecutor had "opened the door" to the admission by the allegations in the petition that referred to substance abuse. Although respondent asserted that his facility treatment and post facility treatment were successful, respondent remained on disability at the time of filing of the amended petition. Ultimately, the trial court ordered the disclosure of the records and scheduled a closed in camera hearing for review of the records with the parties' attorneys.[4]

In general, we review a trial court's decision to allow discovery for an abuse of discretion. *Ligouri v Wyandotte Hosp & Medical Ctr,* 253 Mich App 372, 375; 655 NW2d 592 (2002). Whether a statute bars the production of documents is a question of law that is reviewed de novo. *Id.* The statute at issue in this case is part of the Public Health Service Act, see 42 USC 290dd-2(g), which provides for the establishment of regulations to carry out its purposes. The regulations generally "impose restrictions upon the disclosure and use of alcohol and drug abuse patient records which are maintained in connection with the performance of any federally assisted alcohol and drug abuse program." See 42 CFR 2.3(a); see also *In re BS,* 163 Vt 445, 453; 659 A2d 1137 (1995). The purpose of the federal statute is to encourage patients to seek treatment for substance abuse by assuring them that their privacy will not be compromised. *In re BS, supra* at 448.

Under the applicable regulations, the trial court was required to determine if good cause exists for the disclosure order and, if disclosure is ordered, to issue an order limiting disclosure to those parts of the records essential to accomplish the objective of the order, limiting disclosure to those persons whose need for the information is the basis for the order, and including "such other measures as are necessary to limit disclosure for the protection of the patient, the physician-patient relationship and the treatment services . . . ." 42 CFR 2.64(d) and (e). To the extent the

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excluding evidence of the circumstances surrounding the death of the children's mother and respondent's wife. See *In re MU,* 264 Mich App 270; 690 NW2d 495 (2004).

[3] The treatment facility is known as "West Michigan Addiction Consultants, PC." However, the parties refer to it merely as "WeMAC."

[4] Initially, the trial court ruled orally on the record that it would review the documents in camera. However, the written order did not provide for a separate in camera review by the trial court alone.

records contain confidential communications, the requirements in 42 CFR 2.63 must also be satisfied. *Fannon v Johnston*, 88 F Supp 2d 753, 757-758 (ED Mich, 2000).

42 CFR 2.63(a) states:

> A court order under these regulations may authorize disclosure of *confidential communications made by a patient to a program in the course of diagnosis, treatment, or referral for treatment* only if:
>
> (1) The disclosure is necessary to protect against an existing threat to life or of serious bodily injury, including circumstances which constitute suspected child abuse and neglect and verbal threats against third parties*;*
>
> (2) The disclosure is necessary in connection with the investigation or prosecution of an extremely serious crime, such as one which directly threatens loss of life or serious bodily injury, including homicide, rape, kidnapping, armed robbery, assault with a deadly weapon, or child abuse and neglect; or
>
> (3) The disclosure is in connection with litigation or an administrative proceeding in which the patient offers testimony or other evidence pertaining to the content of the confidential communications. [Emphasis added.].

In general, a trial court's decision whether to require disclosure, including its finding of good cause, is discretionary. *Fannon*, *supra* at 760. Whether the records may actually be received as evidence at a proceeding is determined by applicable rules of evidence for the proceeding. See *Conway v Icahn & Co, Inc*, 16 F3d 504, 510 (CA 2, 1994) (good cause found to disclose records, but the admissibility of the records as evidence was governed by the federal rules of evidence).

Here, we agree with appellants that 42 CFR 2.12(c)(6) does not apply to petitioners' request for the inpatient treatment records. This regulation merely clarifies that mandatory reporting of child abuse or neglect is not barred by the confidentiality provisions in the regulations. See *In re BS*, *supra* at 453. It provides that "restrictions on disclosure and use in these regulations do not apply to the reporting under State law of incidents of suspected child abuse and neglect to the appropriate State or local authorities. . . ."

We need not engage in an analysis of the plain language of the regulation and the definition of the term "reporting." The record reflects that the trial court addressed this regulation only in response to an argument raised by respondent. The court simply observed that a report was made to the Family Independence Agency, albeit it was not made by the record holder. There is no indication that this observation affected the trial court's decision that good cause existed for disclosure of the treatment records. Hence, even assuming that the trial court

erred in considering 42 CFR 2.12, it does not warrant reversal of the disclosure order because the error was harmless.[5]

We also agree with appellants that the trial court erred in considering MCR 2.302(B)(1), which governs discovery in civil proceedings, MCR 2.302(B)(1). The rules of civil procedure only apply to child protection proceedings if specified in MCR 3.900 *et seq.* See MCR 3.901(A)(2). Discovery in child protection proceedings is expressly governed by MCR 3.922. The trial court's reliance on MCR 2.302(B)(1) was harmless, however, relative to its finding of good cause. There is nothing in the record to indicate that the trial court's consideration of MCR 2.302(B)(1) affected its decision to issue the disclosure order.

Next, we reject appellants' challenge to the trial court's finding of good cause under 42 CFR 2.64. Although subsection (c) provides that the judge may examine the records, an examination is not required before entry of the order. Subsection (e) provides a means for a trial court to state the measures that will be taken to limit disclosure. Under subsection (d), the criteria for entry of the order requires that the trial court find:

> (1) Other ways of obtaining the information are not available or would not be effective; and
>
> (2) The public interest and need for the disclosure outweigh the potential injury to the patient, the physician-patient relationship and the treatment services.

Here, the trial court made the requisite findings and adequately engaged in the requisite balancing test. Even if there is some deficiency in the trial court's findings, we would not reverse its finding of good cause because the right result was reached. *Gleason v Dep't of Transportation*, 256 Mich App 1, 3; 662 NW2d 822 (2003).

The trial court appropriately looked to this Court's decision in *In re Baby X*, 97 Mich App 111; 293 NW2d 736 (1980), as permitting the disclosure when the treatment records are necessary and material to the state's proof of neglect. Moreover, such records are typically important to a fact-finder and provide good cause in a situation involving the termination of parental rights. *In the Interest of KCP*, 142 SW3d 574, 583-585 (Tex App, 2004).

Also, it is clear from the record as a whole that the trial court viewed respondent's recovery from substance abuse as a central issue in the case. The court had already been presented with some information regarding respondent's substance abuse treatment at earlier proceedings concerning respondent's parenting time. It recognized in its disclosure decision that petitioners sought disclosure of the inpatient treatment records to discover the extent and nature of respondent's addiction and its effect on the children, and claimed no other way to acquire the information in the records.

[5] A child protection proceeding is subject to the harmless error standard in MCR 2.613(A). See MCR 3.901(B)(1) and MCR 3.902(A).

The record supports the trial court's finding of good cause. Petitioners sufficiently established that they had no other means of establishing the information in the treatment records and that disclosure was necessary and material to the allegations in the supplemental petition. We reject appellants' claim that evidence concerning the degree of respondent's addiction and recovery could be established from evidence regarding his aftercare treatment, including cross-examination of the same aftercare providers who testified at the hearing regarding respondent's parenting time.

The very nature of aftercare treatment indicates that there must have been earlier substance abuse treatment. Further, the evidentiary rules in a child protection case depend on the nature of the proceeding. When a petitioner seeks to terminate parental rights at an initial dispositional hearing, the procedures in MCR 3.977(E) apply. As this Court recently reaffirmed in *In re AMAC*, 269 Mich App 533, 536; 711 NW2d 426 (2006), the adjudicative and dispositional phases are separate. The rules of evidence apply at the adjudicative trial. MCR 3.972(C)(1). We are not persuaded that respondent's aftercare providers could provide admissible evidence regarding the inpatient treatment. Appellants' mere statement to the contrary is insufficient to invoke appellate review. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003). Furthermore, even if the aftercare providers could provide admissible evidence, under the current version of 42 CFR 2.64(d)(1), it is sufficient that other ways of obtaining information would not be effective. An accurate account of the nature and extent of respondent's inpatient treatment may assist the trier of fact in evaluating respondent's recovery from his substance abuse problems and how it may have affected his parenting at the time relevant to the supplemental petition.

With regard to the potential injury from disclosure, the record reflects that appellants provided little information regarding the potential for injury that might arise from the disclosure. Although appellants submitted an affidavit from a representative of the record holder, the affidavit principally addressed the general concern underlying the federal statute in the first instance, i.e., to encourage individuals to seek substance abuse treatment by protecting their privacy.[6] See generally *In re BS, supra* at 448; *Fannon, supra* at 757. The affiant claimed no injury peculiar to respondent, except for concern that news stories concerning the potential release of respondent's medical records had already been generated and broadcast to the public. Such public knowledge may support a court's conclusion that nondisclosure is not needed to protect a patient's privacy interests. Any remaining privacy interest could be protected by an in camera review and protective order. See *Fannon, supra* at 759-760. Additionally, in this case, the supplemental petition itself already included an allegation that respondent participated in inpatient substance abuse treatment. Respondent's right to privacy could be protected in this case by an appropriate in camera review and protective order. Hence, we find no basis for disturbing the trial court's decision to grant petitioners' request for a disclosure order. The

[6] This affidavit refers to the federal regulations for disclosure and opines that the guidelines for disclosure were not met. However, the duty to interpret and apply the law presents an issue for the courts, not the parties' witnesses. See *Hottmann v Hottmann*, 226 Mich App 171, 179; 572 NW2d 259 (1997).

record supports the court's conclusion that the public interest and need for disclosure outweighed potential injury to the patient, the physician-patient relationship, and the treatment facility.

We agree with appellants, however, that the trial court erred by failing to rule on petitioners' request concerning confidential communications under 42 CFR 2.63(a)(1). Indeed, because the trial court did not review the inpatient treatment records, it is unclear how the court could have resolved petitioners' request for disclosure of confidential communications under 42 CFR 2.63(a)(1). To the extent that the records contained respondent's confidential communications in the course of diagnosis, treatment, or referral for treatment, petitioners were required to satisfy both the good cause requirements in 42 CFR 2.64 and the requirements in 42 CFR 2.63. See *Fannon, supra* at 757. Hence, on remand, the trial court shall modify its disclosure order to provide for its own in camera review of confidential communications under 42 CFR 2.63 *before* any disclosure of the inpatient treatment records to petitioners.

We express no opinion regarding petitioners' claim that confidential communications should be disclosed under 42 CFR 2.63(a)(3), inasmuch as this claim was not presented to the trial court and is not properly before us. In general, an appellee may only raise alternative grounds for affirmance that were presented to, but rejected by, a trial court. See *Middlebrooks v Wayne Co,* 446 Mich 151, 166 n 41; 521 NW2d 774 (1994). But "[t]he power of a lower court on remand is to take such action as law and justice require that is not inconsistent with the judgment of the appellate court." *McCormick v McCormick,* 221 Mich App 672, 679; 562 NW2d 504 (1997). Hence, petitioners are not precluded from presenting this issue to the trial court on remand.

Finally, we find merit to appellants' claim that the trial court's disclosure order failed to contain adequate safeguards under 42 CFR 2.64(e), because it provided only for an in camera review with the attorneys of record. Although the trial court's remarks preceding entry of its order indicate that it intended to conduct an initial review outside the presence of the attorneys to determine what information should be redacted, "[c]ourts speak through their written orders, not their oral statements." *Boggerty v Wilson,* 160 Mich App 514, 530; 408 NW2d 809 (1987). Hence, on remand, the trial court shall modify the disclosure order to provide for its own initial in camera review of the records.

We express no opinion regarding the admissibility of any specific information in the treatment records in the proceedings on remand. The admissibility of the evidence will depend on the purpose for which it is offered. See *People v Sabin (After Remand),* 463 Mich 43, 56; 614 NW2d 888 (2000). We disagree with appellants that disclosure must be limited to inpatient treatment for the period preceding the supplemental petition. The fact that a matter was not specifically pleaded in a petition does not preclude its admission to prove the matters alleged. See *In re Sours,* 459 Mich 624, 639 n 3; 593 NW2d 520 (1999). We also note that, at this stage of the proceedings, it is possible that respondent could present evidence at the adjudicative trial that would open the door to certain information in the inpatient treatment records. The federal regulation governing confidential communications, 42 CFR 2.63(a)(3), contemplates that this could occur.

But in light of the limitations imposed by 42 CFR 2.64, it would be premature for the trial court to rule on any disclosure purpose sought by petitioners pertaining solely to the dispositional phase until after a decision is rendered at the adjudication trial regarding the trial court's

jurisdiction over the children. Thus, on remand, the trial court shall modify its disclosure order to provide for consideration of petitioners' request for disclosure in a bifurcated matter, consistent with the procedures in MCR 3.977(E) for adjudicative and dispositional proceedings, as the need for the evidence arises.

Affirmed in part, modified in part, and remanded for further proceedings. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ David H. Sawyer
/s/ Patrick M. Meter